

## 28.1383(A)(1)-2

### **Aggravated [Driving/Actual Physical Control] While Under The Influence While [License/Privilege To Drive Was [Suspended/Canceled/Revoked/Refused/Restricted] With Lesser-Included Offense Of [Driving/Actual Physical Control] While Under The Influence**

The crime of aggravated [driving/actual physical control] while under the influence while [defendant's driver's license to drive/ privilege to drive] is [suspended/ canceled/ revoked/ refused/ restricted] includes the lesser offense of [driving/ actual physical control] while under the influence. You may consider the lesser offense of [driving/ actual physical control] while under the influence if either:

1. You find the defendant not guilty of aggravated [driving /actual physical control] while under the influence; or
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of aggravated [driving/actual physical control] while under the influence.

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**SOURCE:** A.R.S. §§ 28-1383(A)(1) & -1381(A)(1) (statutory language as of September 1, 2001); *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996).

**USE NOTE:** Use choices in brackets as appropriate to the facts.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. See *State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

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